IN THE SUPREME COURT
OF THE UNITED STATES

No. 77-515

HOLT CIVIC CLUB, etc., et al.,

Appellants,

vs.

CITY OF TUSCALOOSA, etc., et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ALABAMA

BRIEF FOR THE APPELLANTS

Neil Bradley
Laughlin McDonald
Christopher Coates
52 Fairlie Street, NW
Atlanta, GA 30303

Edward Still
601 Title Building
Birmingham, AL 35203

Bruce Ennis
New York, NY 10016

Attorneys for Appellants

American Civil Liberties
Union Foundation, Inc.

INDEX

TABLE OF AUTHORITIES

The Constitution of the United States

Statutes and Rules

Federal:

IN THE SUPREME COURT
OF THE UNITED STATES

No. 77-515

HOLT CIVIC CLUB, etc., et al.,

Appellants,

vs.

CITY OF TUSCALOOSA, etc., et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ALABAMA

BRIEF FOR THE APPELLANTS

OPINIONS BELOW

Only the opinion of the court of appeals of December 31, 1975, is reported, appearing at 525 F.2d 653. This opinion and the other opinions are included in the Jurisdictional Statement (JS) appendix.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. §1253. The orders appealed from were entered by a court of three judges convened pursuant to 28 U.S.C. §§2281 and 2284. The

order dismissing the complaint on the merits and denial of injunctive relief was entered on June 7, 1977, and reconsideration thereof was denied July 14, 1977. Timely notice of appeal from both orders was filed August 5, 1977. 28 U.S.C. §2101(b).

STATUTES INVOLVED

The three statutes attacked in this case have been recodified as follows:

Former Citation	Present Citation
Ala. Code, Tit. 37, §9 (1958 Recomp.)	Ala. Code, §11-40-10 (1975)
Ala. Code, Tit. 37, §733 (1958 Recomp.)	Ala. Code, §11-51-91 (1975)
Ala. Code, Tit. 37, §585 (1958 Recomp.)	Ala. Code, §12-14-1 (1975)

The first two statutes are identical, save a few stylistic changes, in the recodification to their respective former codifications. As regards the third, on December 27, 1977, the recorder's courts were abolished and replaced by municipal courts having the same jurisdiction: therefore the former and the present statutes are not identical but have the same effect.

Each of the statutes currently in effect is reproduced in Addendum B to this brief. The former statutes are reproduced at JS 6a-9a.

QUESTIONS PRESENTED

1. May a state provide that residents of a geographical area shall be governed by an adjacent municipality, while prohibiting such residents from voting in municipal elections or otherwise participating in municipal government over themselves?

2. May a three-judge court dismiss a claim of denial of equal protection by residents of such an area, who are also under the authority of a county government, because the relief they seek is not the right to vote in the municipality but rather the removal of the municipal authority over them?

STATEMENT OF THE CASE

Facts

The plaintiffs-appellants are an unincorporated civic association and seven residents of the unincorporated community of Holt, located on the northeastern fringe of the City of Tuscaloosa, Alabama. Holt is an urbanized, poor area of mixed racial composition.

Because Holt is situated within 3 miles of the City of Tuscaloosa, its residents are subject to the "police and sanitary regulations" of the City of Tuscaloosa, Ala. Code, §11-40-10 (1975), to the jurisdiction of the municipal court, Ala. Code, §12-14-1 (1975), and to the licensing authority of the city, Ala. Code, §11-51-91 (1975). (A6)[1] Real and personal property located outside the city is not subject to the city's property tax nor to its zoning power.[2]

This "police jurisdiction"[3] contains about 16,000 residents while the city itself

1. Addendum A to this brief contains a list of the ordinances of the City of Tuscaloosa that are applicable in the "police jurisdiction."

2. Ala. Code, §11-40-10 (1975), has been held not to grant the power to zone extraterritorially, but such power could be granted by the legislature. Roberson v. City of Montgomery, 285 Ala. 421, 233 So.2d 69 (1970).

3. The term "police jurisdiction" will be used in this brief to refer to the extraterritorial zone in which the City may exercise its powers — that is, the three mile wide belt extending outward from the city limits.

has 65,733 residents. (A 17-19) These police jurisdiction residents are not allowed to vote in Tuscaloosa's municipal elections nor may they initiate a recall petition. (A 6)

The City of Tuscaloosa was unable to determine how many arrests it makes within the police jurisdiction, but was able to provide some general statistics about the time spent by each police patrol car in the police jurisdiction, Answers to Third Interrogatories, pp. 2-3. It is roughly 17% of all seven patrol's time.

The city also collects various types of licenses and taxes in its jurisdiction. The percentage of these license fees or taxes collected in the police jurisdiction were as follows (A 33-35 and 41):

	1973	1975
business licenses	2.4%	2.5%
cigarette tax	1.1%	15.1%
lodging tax	19.6%	11.4%
beer tax	14.7%	8.5%
building inspection fees	25.0%	10.6%
number of building permits	11.9%	15.0%

Proceedings

This action was originally dismissed by a single judge court, said dismissal being reversed by the court of appeals. The case was remanded for the convening of a three-judge court. Discovery proceeded both before

and after the original dismissal. The three-judge court granted the motion to dismiss, no trial being held.

Both the equal protection and due process claims were dismissed. The court granted leave to amend to allege specific ordinances which plaintiffs claimed denied them due process, and dissolved the three-judge court remanding the case to the single judge for further proceedings, Plaintiffs sought reconsideration of that ruling (A 42), which was denied. This appeal followed.

Summary of Argument

This case is brought by residents of the "police jurisdiction" of the City of Tuscaloosa who complain that they have been denied equal protection and due process of the laws because they are denied the franchise in the city government. City residents who stand in practically the same relationship to the city are allowed to vote. The remedy sought by appellants is the removal of governmental authority over them -- at least by any government in which they cannot vote.

The court below and this Court have jurisdiction to hear this case. The Tax Injunction Act, 28 U.S.C. §1341, does not bar jurisdiction because any effect on taxes is ancillary to the challenge to governmental authority. To rule on the applicability of 28 U.S.C. §1341, this Court would have to pass on issues not decided below: whether the Act covers declaratory relief, whether it covers license fees, and whether Alabama provides "a plain, speedy and efficient remedy."

Appellants assert causes of action under 42 U.S.C. §1983 against individual officials. Although the city itself might not be a proper party, this question need not be reached because of the presence of clearly appropriate defendants.

Appellants have standing to challenge the governmental authority over them. They are affected by it in their daily lives. They do not have to claim, therefore, specific threats of prosecution, but nonetheless they do allege specific acts of enforcement of ordinances.

The three-judge court dismissed appellants' claims on the merits. This was a denial of injunctive relief and jurisdiction to hear the appeal is properly vested by 28 U.S.C. §1253.

The city has not shown, and the court below did not find, that the police jurisdiction residents have substantially less interest in the city government than the residents of the city proper. Kramer v. Union Free School District No. 15, 395 U.S. 621 (1969). The city's power and responsibility in the police jurisdiction is extensive and analogous to the powers of organized counties over unorganized counties in South Dakota, Little Thunder v. State of South Dakota, 518 F.2d 1253 (8th Cir. 1975), or the powers that the State of Maryland had over residents of the National Institutes of Health enclave, Evans v. Cornman, 398 U.S. 419 (1970).

There are alternative methods of providing some governmental services to, and restrictions upon, the urban fringe, without disenfranchising the residents of the area.

These include active governance by county officials or the creation of special-purpose districts to provide some services. Neither of these methods would place urban fringe residents under the control of a government for which others could vote, but they could not. If such alternative methods which meet the governmental interest but avoid the discriminatory aspects are available, then the Court should enjoin the discriminatory method. Buckley v. Valeo, 424 U.S. 1 (1976).

The district court dismissed this suit on the grounds that the plaintiffs had asked for the wrong relief -- although the court apparently acknowledged that the plaintiffs stated a cause of action. A court should not dismiss a suit on the basis of the relief requested, but should consider whether the plaintiff is entitled to any relief. New Amsterdam Casualty Co. v. Waller, 323 F.2d 20 (4th Cir. 1963), cert. denied 376 U.S. 963 (1964).

ARGUMENT

I

THE QUESTION OF JURISDICTION.

In its order of March 6, 1978, this Court postponed further consideration of the question of jurisdiction until the hearing of the case on the merits. Appellants will herein discuss those issues which might conceivably be of concern to this Court.

The complaint alleged causes of action under the equal protection and due process clauses of the fourteenth amendment and 42 U.S.C. §1983. Jurisdiction was alleged to be vested by virtue of 28 U.S.C. §§1331, 1343, 2201 and 2281. The relief prayed for was that Ala. Code, Tit. 37, §9 (1958 Recomp.) be declared unconstitutional and its enforcement enjoined; that Ala. Code, Tit. 37, §§585 and 733 (1958 Recomp.) be declared unconstitutional and their enforcement enjoined insofar as they affect the police jurisdiction; that a preliminary injunction be granted requiring each member of the defendant class to treat questioned taxes and fees as if paid under protest; and such other, further and different relief as may be justified.

The Tax Injunction Act

Defendants have asserted both in the district court and here that the district court lacked jurisdiction by virtue of the Tax Injunction Act, 28 U.S.C. §1341. That statute reads:

> The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.

This matter has not been addressed by any of the courts below, save the initial dismissal by the single judge court. Prior to dismissing the whole complaint, that first opinion also stated:

> A portion of the relief sought, however, i.e., a determination that the paying of taxes be judicially determined to have been under protest cannot be granted and that portion of the complaint may be dismissed by a single judge. Maryland Citizens for a Representative Assembly v. Governor of Maryland, 429 F.2d 606 (4th Cir. 1970).

JS 34a. This was apparently based on 28 U.S.C. §1341. The court of appeals made no mention of this ground when it reversed, and neither did the three-judge court on remand. Appellants suggest that this Court

need not reach any issue presented under §1341 on this record for several reasons.

First, appellants have not, in the traditional sense, sought to enjoin the collection of a state tax. They challenge governmental authority. The power to tax is but one incident of governmental authority, albeit a highly visible one. Appellants raise substantial constitutional issues about governmental structure and authority and could hardly do so without it having an effect on the authority of that government to tax. But that effect was not the purpose of the litigation, and to interpret §1341 as forbidding all suits which may have an ancillary effect would be inconsistent with precedent.

For example, in Harper v. Virginia State Board of Elections, 383 U.S. 663 (1966), this Court reversed the dismissal of a complaint by the district court and held a state poll tax statute unconstitutional. That decision certainly had an effect on the state poll tax, but §1341 was not held to bar jurisdiction.[1] It was not mentioned in that opinion, nor in Hill v. Stone, 421 U.S. 289 (1975). Appellants are primarily challenging the validity of Ala. Code,

1. See also, United States v. State of Alabama, 252 F.Supp. 95 (M.D. Ala. 1966)(three-judge court), where the poll tax was specifically enjoined, not merely held unconstitutional.

11-40-10 (1975), which authorizes the enforcement of police and sanitary regulations in the police jurisdiction. Section 1341 is not relevant to this empowering provision, even if it could be properly applied to taxing and licensing ordinances enforced thereunder. Therefore, the Court can properly reach the challenge to the police and sanitary regulations.

Second, if the Court were to reach the question of the applicability of §1341 to the whole complaint, several issues would be presented. One is whether this statute encompasses actions for declaratory judgment. Although appellants have asked for an injunction against the statute's extension of governmental powers, they have not asked for an injunction against the collection of any state tax. This Court has not expressly decided whether, if §1341 in a given case forbids the issuance of inuunctive relief, it also prohibits issuance of declaratory relief. See, Great Lakes Dredge and Dock Co. v. Huffman, 319 U.S. 293, 299 (1943). Jurisdiction might exist for a district court to declare the collection of a state tax unconstitutional even if injunctive relief could not be granted. Compare, Steffel v. Thompson, 415 U.S. 452 (1974), with Samuels v. Mackell, 401 U.S. 66 (1971).

Third, there would be presented the issue, required by the statute, of determining whether there exists "a plain, speedy and efficient remedy" in the courts of Alabama. This record would not be a good basis for determining that issue. Such determination should be made in the first instance by the district court.[1]

And finally, there would be presented the question of whether license fees, which is one of the matters involved, are "taxes" within the meaning of §1341. The license fees in the police jurisdiction are not treated as general taxes because the fees are limited not only to one-half of the amounts within the city proper, but are also limited in purpose to cover the cost of providing services. White v. City of Decatur, 225 Ala. 646, 144 So. 873 (1932). Thus they

1. Appellants suggest, however, that there is no effective remedy. In Weissinger v. Boswell, 330 F.Supp. 615 (M.D. Ala. 1971)(three-judge court), a suit challenging the ad valorem tax assessments in Alabama, the court said:

> It should be noted that defendant's contention, as a ground for dismissal, to the effect that plaintiffs' action is barred by the Tax Injunction Act of 1937, 28 U.S.C. §1341, was considered and disposed of by this Court in the October 29, 1969, order. This portion of our order was to the effect that the Alabama courts do not afford plaintiffs a plain, speedy and efficient remedy....

330 F.Supp. at 618, n.4.

are unlike taxes in that they are actually fees for services, as opposed to general revenue taxes.

Statutory Jurisdiction

The defendants in this case are the City of Tuscaloosa, the three city commissioners, and the city recorder. There can be no question that proper jurisdiction is had over the individual defendants by virtue of 42 U.S.C. §1983. Although an argument could be made that the city itself is not a proper defendant, this case does not present that issue directly. Although the city may not be subject to suit under §1983,[1] to decide that the city is not a proper party at all would require decision of important issues. This is not necessary where there is jurisdiction over other defendants in the case.[2]

Although the complaint alleged federal question jurisdiction, 28 U.S.C. §1331, no dollar amount in controversy was alleged.[3]

1. Monroe v. Pape, 365 U.S. 167 (1961); City of Kenosha v. Bruno, 412 U.S. 507 (1973).

2. In Kenosha, the Court recognized that the district court might have proper jurisdiction, and directed inquiry on remand of that issue, based on the intervention of the state attorney general. 412 U.S. at 513-55.

3. This defect in the complaint has never been put in issue. No answers to the complaint have ever been required, the courts twice granting motions to dismiss.

With this lacking, it may be that the only way in which the city is a proper party defendant would be if a cause of action inferred directly under the fourteenth amendment and 28 U.S.C. §1343 would be allowed. As in Mt. Healthy City School District v. Doyle, 429 U.S. 274 (1977), that issue need not and should not be decided here because the issues presented may be decided under other proper authority because other defendants are present. If the jurisdictional issue could be reached it should be decided by the district ciurt on remand if such proceedings become necessary. Unlike Mt. Healthy, where at least in this Court the school board was the only defendant, the presence of other defendants here avoids the need for deciding such an important issue.[1]

---

1. This Court's opinion in Mt. Healthy does not reflect the presence of any defendant except the school board. The opinions of the district court and the court of appeals are unreported. Appellants have examined the appendix in Mt. Healthy and it appears that individual school board members were dismissed as defendants by the district court and relief was granted only against the school board. Only the board appealed and there was no cross appeal. Thus when the case reached this Court, there was no other defendant and the Court was faced with the need of deciding proper jurisdiction vis-a-vis the school board. Appellants urge that the presence of other defendants here allows the Court to avoid the decision of important jurisdictional questions, as did other factors in Mt. Healthy. Jurisdiction can be properly laid on well settled law to decide the issues presented here.

Standing

The citizen plaintiffs challenge the overall authority of a government to govern them. They do not simply claim that one particular ordinance or law is applied to them in an unconstitutional manner. In such a case an actual threat of application of that ordinance would have to be made. Compare, Boyle v. Landry, 401 U.S. 77 (1971). Furthermore, plaintiffs have alleged enforcement of particular ordinances against them, licensing, taxing and inspection ordinances. (A8) They thus present a case or controversy as residents of the community challenging the governance of the area in which they live. Appellees have conceded as much.[1]

---

1. In their brief to the court of appeals the appellees stated:

> Granting, however, that these Plaintiffs are the only persons who could question the authority of a state to delegate any vestage [sic] of police power over them to adjacent municipalities, and admitting standing for this purpose, then the complaint should be so considered.

Brief of Appellees, No. 75-3323, pp. 8-9.

Although appellants do not concede that their right to raise the issue is contingent upon their being the only ones who can raise it, this is a correct view of the situation. A resident of, for example, another state could not challenge a police jurisdiction traffic violation based on the claim of unconstitutional government because he would not have a grievance. He is not treated differently from any other sojourner. It is the residents,

(Footnote continued to next page.)

Three-Judge Court Act

Appellants properly invoked the three-judge court act, 28 U.S.C. §2284 by challenging the constitutionality of a state statute having statewide application and seeking an injunction thereof.[1] The basic police jurisdiction statute provides that if any city or town enforces police or sanitary regulations, said laws "shall have force and effect in the limits of the city or town and in the police jurisdiction thereof, ..." JS 6a. There may be some city or town in Alabama which has no such ordinances, but if they have any they apply to the police jurisdiction. The statute, unquestionably, has statewide effect. Compare, Board of Regents of the University of Texas System v. New Left Education Project, 404 U.S. 541 (1972).

The equal protection claim was dismissed on the merits by the three judge court in the words, "Equal protection has not been extended to cover such contention." JS 2a. The due process claim, that "extraterritorial regulation

(Footnote continued from preceding page.)

and only the residents, who can claim that in their daily lives they are governed by an unconstitutional form of government because residence is the touchstone of the right to have a say so in one's government.

1. This action was filed prior to the enactment of Act of Aug. 12, 1976, Pub.L. 94-381, 90 Stat. 1119, which provides that §2281 shall continue in effect for those actions commenced on or before the date of enactment.

by a municipal government is per se a violation of due process," JS 2a, was dismissed. Leave to amend was granted to specify particular ordinances which plaintiffs might claim deprived them of liberty or property, but the claim of a per se denial of due process had been squarely rejected.[1]

The dissolution of the three-judge court and the dismissal of the claims under equal protection and due process were not made on the basis that the complaint was "wholly insubstantial" or the like, Goosby v. Osser, 409 U.S. 512 (1973); nor was it a dismissal on any procedural grounds. Gonzalez v. Automatic Employees Credit Union, 419 U.S. 90 (1974). The dismissal was a "resolution of the merits of the constitutional claim presented below," MTM, Inc. v. Baxley, 420 U.S. 799, 804 (1975). The dismissal operated as a denial of the injunctive relief sought and therefore jurisdiction of this Court to hear the appeal properly lies under 28 U.S.C. §1253.

1. That the leave to amend was not a license to relitigate the per se claim is made clear by the dissolution of the three-judge court and the remanding of the case to the single judge for further proceedings. JS 3a.

II

THE STATE OF ALABAMA HAS NOT SHOWN A COMPELLING STATE INTEREST TO SUSTAIN THE DISTINCTION IT HAS MADE BETWEEN RESIDENTS OF TUSCALOOSA'S "CITY LIMITS" AND RESIDENTS OF TUSCALOOSA'S "POLICE JURISDICTION".

A. Tuscaloosa Exercises General Governmental Authority In Its Police Jurisdiction.

The principal question to be decided by this Court is whether the difference in the authority exercised by a city in its police jurisdiction in comparison with that exercised within its corporate limits is supported by a compelling state interest justifying the governance of these police jurisdiction residents while denying them the franchise. The case is therefore analogous to Evans v. Cornman, 398 U.S. 419 (1970) and Little Thunder v. State of South Dakota, 518 F.2d 1253 (8th Cir. 1975), in questioning whether the state may use different definitions of territorial jurisdiction for voting and other government functions.

Whether the plaintiffs are attacking a non-geographic definition of voter qualifications, as in Kramer v. Union Free School District No. 15, 395 U.S. 621 (1969), and Cipriano v. City of Houma, 395 U.S. 701 (1969),

or a geographic one, as in Evans or Little Thunder, the test is one of "strict scrutiny" involving

> Whether classifications allegedly limiting the franchise to those resident citizens "primarily interested" deny those excluded equal protection of the laws depends, inter alia, on whether all those excluded are in fact substantially less interested or affected than those the state includes.

Kramer, supra, 395 U.S. at 632. Even though Kramer spoke of "resident citizens," substantially the same test was applied to the question of residency in Evans v. Cornman, supra, 398 U.S. at 422-23.

The legislation establishing the police jurisdiction, in effect, establishes two geographical areas for a city. The first is the city proper: an area where the city may exercise its full authority and whose residents are electors of the city government. The second is called the "police jurisdiction": an area where the city may exercise limited but substantial authority and whose residents are not electors of the city government.

A city may enforce its "police and sanitary regulations" in the police jurisdiction, Ala. Code, §11-40-10 (1975). These regulations encompass nearly all of the regulatory powers[1] of the city except zoning powers.

1. Attached hereto as Addendum A is a list of the ordinances of the City of Tuscaloosa actually applicable in the police jurisdiction.

Roberson v. City of Montgomery, 285 Ala. 421, 233 S.2d 69 (1970). Although the municipality cannot tax real and personal property in the police jurisdiction, it may collect license fees up to one-half of the in-city rate. Ala. Code, §11-51-91 (1975).[1]

In defense of its police jurisdiction, the city has raised only the issues of protection of the city from a deleterious affect on the "quality of life" in the city and protection of the police jurisdiction residents "against the encroachment of incompatible and noxious land uses adjacent to and near their homes."(A 19-21) Neither of these explains why the residents of the police jurisdiction are not "primarily interested" in the city government so that they should be allowed to vote.

The difference between the city's power in the police jurisdiction and the city's power within the city itself is fairly small. The extent of Tuscaloosa's power over the

1. The city is supposed to tailor its license fees in the police jurisdiction to the services performed and may not use the licenses as a revenue producer. White v. City of Decatur, 225 Ala. 646, 144 So. 873 (1932); Alabama Power Co. v. City of Carbon Hill, 234 Ala. 489, 175 So. 289 (1937). Because the licensee must demonstrate the invalidity of the license amount, City of Andalusia v. Fletcher, 240 Ala. 110, 198 So. 64 (1940), there is little incentive to the city to charge less. The City of Tuscaloosa charges the full amount permissible by statute.

police jurisdiction is analogous to that of an organized county over an unorganized county in South Dakota.

> [E]ach of the unorganized counties and the organized counties to which it is attached form a single unit of local government "for the administration of governmental and fiscal affairs, including all state, county, judicial, taxation, election, recording, canvassing, and foreclosure purposes, except in cases where the administration of said affairs is expressly otherwise provided by law. SDCL §7-17-1 (1967)."

Little Thunder v. State of South Dakota, 518 F.2d 1253, 1256 (8th Cir. 1975). The only function that the unorganized county could carry out independent of the organized county to which it was attached was its own highway building and maintenance program. 518 F.2d at 1255; SDCL §13-12-5.

In other cases decided by this Court, governmental units with less powers than Tuscaloosa exercises in the police jurisdiction have been held to be subject to the equal protection clause in their electoral apportionment. For instance, the residents of the National Institutes of Health enclave in Maryland, were subject to Maryland's criminal, tax, unemployment and workman's compensation,

and driver's license laws, its civil court jurisdiction, but not to real and personal property taxes, state criminal courts (state criminal laws were prosecuted in federal court), or to compulsory education laws. Evans v. Cornman, 398 U.S. at 424-5. While the NIH enclave residents were subject to Maryland's criminal laws but not its criminal courts, the people of Holt are subject to Tuscaloosa's police and sanitary ordinances and Tuscaloosa's municipal court jurisdiction.

B. There Are Alternative, Non-Discriminatory Methods of Fulfilling The State Purpose.

When state action is subjected to the "strict scrutiny" test, the Court should examine alternative strategies that could achieve the same purpose. If there are such alternatives which fulfill a legitimate state purpose without unconstitutional side effects, then the discriminatory method cannot be defended on the grounds of necessity. See, e.g., Buckley v. Valeo, 424 U.S. 1, 14-23 (1976); Dunn v. Blumstein, 405 U.S. 330 (1972).

The State purpose here might be to benefit police jurisdiction residents by giving them some, but not all, municipal services or it could be to protect the city from

undesirable conditions in the police jurisdiction.[1] The City of Tuscaloosa has actually argued that both justify its exercise of police power in the extraterritorial zone. (A 19-21 and Motion to Affirm, 4-6)[2] There exist other methods of fulfilling either state purpose without subjecting residents of the police jurisdiction to goverance by an entity from which they are disenfranchised. A recent law review article lists five proposed solutions:

---

1. The State has apparently decided that only areas not under municipal control could be such a threat to an adjacent municipality. The police jurisdiction of one city does not extend into the territorial li ts of another city, even though such a city could be a threat to health and order by failing to have any police, housing or health ordinances. The City of Tuscaloosa has, in fact, argued that it should exercise police powers in areas that may potentially be part of the City, not in other cities. This assumes that any city will provide proper regulation of life but that suburban development and county government will not.

2. These are the usual justifications given by commentators. See, Comment, "The Constitutionality of the Exercise of Extraterritorial Powers by Municipalities," 45 Chicago L.Rev. 151, 151-2 (1977); F. Sengstock, Extraterritorial Powers in the Metropolitan Area, 3, 45 (1962); R.T. Daland, Municipal Fringe Area Problem in Alabama 3 (1953); J.C. Bollens, "Controls and Services in Unincorporated Urban Fringes," in ICMA, Municipal Year Book 53-54 (1954).

a) reversion of control to the state legislature (to pass legislation) and state police (to enforce);

b) active management by State officials;

c) active management by county officials;

d) management by special purpose government;

e) management at the local level (e.g., townships).

Comment, "The Constitutionality of the Exercise of Extraterritorial Powers by Municipalities," 45 Chicago L.Rev. 151, 171-78 (1977).

The first three of these could be used in Alabama under the existing constitutional framework. Management by county officials could easily be the most practical.[1] In Alabama -- as in most Southern states -- the county is

---

1. Counties have a sheriff to provide police protection, courts to enforce laws, and the ability to provide a myriad of other municipal-type services, among which are the following (all citations are to the 1975 Ala. Code): levy taxes, support the poor, lay sewers, and construct sewage treatment plants (§11-3-11); maintain streets (§11-83-1); participate in a forest fire protection program (§9-13-181); mark boundaries of burial places (§11-17-1); establish parks and museums (§11-18-1); establish recreation boards (§11-86-1); establish water conservation and irrigation corporations (§§9-10-30 and 11-21-1 et seq); finance waterworks (§§11-9-20 et seq); establish land use controls in flood-prone areas (§11-19-1); adopt a building code (§41-9-166); construct or acquire airports (§4-1-1); contract with a city for the city to provide fire protection (§11-43-142); own an electrical system (§11-81-200); create a housing authority (§24-1-60); zone around an airport (§4-6-2); establish sanitary
(Footnote continued to next page.)

a powerful an politically important unit of government. And any of the other four could be utilized, and are constitutionally preferable to the current method.[1]

C. Government Without Franchise As Here Denies Appellants Due Process of the Law.

Appellants present an unusual question. Government without representation is such an anathema in our federal system that it is rarely necessary to challenge governmental extensions of authority without corresponding extensions of the franchise. And while Evans v. Cornman, 398 U.S. 419 (1970), presented a somewhat analogous factual situation, different relief has been sought here. Appellants rely

---

(Footnote continued from preceding page.)

conditions for livestock (§2-4-4); and establish and maintain libraries (§11-90-1 et seq).

1. In addition to government by the county, many areas of Alabama have realized the necessity of providing more services than the county could perform (or needed to perform on a county-wide basis) and have adopted special, limited purpose, local governments. These are increasing in use in Alabama. See the following amendments to Ala. Const. (1901): 227 (irrigation districts); 230 (hospital district, Baldwin County); 239 (fire protection or garbage disposal districts, Jefferson County); 243 (Elk River watershed authority); 247 (Bear Creek watershed authority); 257 (water management districts); 343 (public service districts in Shelby County for fire, water, sewage, medical, police, and other services); and 358 (fire protection or garbage disposal districts, Tuscaloosa County).

primarily on equal protection where the franchise has been granted, but limited in an unconstitutional way. Limiting the electorate has often been held to violate the equal protection clause. Harper v. Virginia Board of Elections, 383 U.S. 663 (1966).

But appellants also urge that the structure of government imposed on them, government by an adjacent geographical entity in which they have no voice, is also a denial of due process of law. They have liberty and property interests which are regulated not by themselves but by others. The issue appellants raise is so fundamental an issue that it has not been litigated, or not reached, in decisions based on the equal protection clause. But Judge Johnson, concurring in United States v. Alabama, 252 F.Supp. 95, 105-08 (M.D. Ala. 1966)(three-judge court), reasoned that the poll tax was a violation of the due process clause of the fourteenth amendment. The right to vote was considered protected by the due process clause by the court in United States v. Texas, 252 F.2d 234, 250 (W.D. Tex. 1966)(three-judge court) aff'd., 384 U.S. 155 (1966).

Appellants urge that governance without the franchise is a fundamental violation of the due process clause.

III.

THE DISTRICT COURT ERRED IN HOLDING THAT APPELLANTS' COMPLAINT MUST BE DISMISSED BECAUSE THEY SOUGHT THE WRONG REMEDY.

The district court held as follows in dismissing the appellants' equal protection claim:

> Plaintiffs do not seek extension of the franchise to themselves, see Little Thunder v. South Dakota, 518 F.2d 1253 (CA8, 1975), but rather a declaration that extraterritorial regulation is unconstitutional per se. Equal protection has not been extended to cover such contention. The motion to dismiss is GRANTED with respect to the equal protection claim.

JS 2a.

If the court was ruling that plaintiffs could obtain relief if they sought the franchise but not if they seek freedom from regulation, then the court erred in dismissing the complaint. It is not the relief demanded, but the relief to which the plaintiff is entitled, that he will receive. Wright & Miller, Federal Practice and Procedure: Civil §1255, p. 252; §2664.

> [The plaintiff] need not set forth any theory or demand any particular relief for the court will award appropriate relief if the plaintiff is entitled to it upon any theory.

New Amsterdam Casualty Co. v. Waller, 323 F.2d 20, 24-5(4th Cir. 1963), cert. denied 376 U.S. 963 (1964). Hostrop v. Board of Junior College District No. 515, 523 F.2d 569 (7th Cir. 1975), cert. denied 425 U.S. 963 (1976). Courts clearly are not limited to the prayer for relief in view of the federal rules of civil procedure. Rule 8(a) and 54(c), F.R.Civ.P.

Of course, to cover such a situation plaintiffs prayed for "such other, further, and different relief as the premises may demand." (A 10) Such a general prayer is really not necessary in view of the civil rules of procedure.

An extension of the franchise to the residents of the police jurisdiction might have had some undesired results. For instance, some police jurisdiction residents might not want to be included in the city; conversely some cities might not like to have a substantial number of new residents thrust upon them. An order denying municipal authority over the residents of the police jurisdiction unless the State subsequently chooses to confer the franchise on these residents is a less intrusive remedy than would be an order directly compelling the franchise. As such, it was not only appropriate relief, but suggested by principles of comity. Rather than extend the franchise, the state legislature and various county commissions could choose a method of providing

some additional government (if they felt any was needed) for the urban fringe. See Section I-B, supra, at 26-7.

IV.

THE RELIEF REQUESTED WOULD NOT DISRUPT INNOVATIVE STATE GOVERNMENTAL EXPERIMENTS BECAUSE THE AUTHORITY CHALLENGED IS VIRTUALLY UNIQUE AND NOT RECENT IN ORIGIN.

The first session of the Alabama Legislature incorporated ten towns and one city and in each case, established specific boundaries or made reference to the boundaries established by others. Ala. Acts, pp. 106-125 (1819).[1] From this time until 1907, the powers of city officials were specifically limited to the corporate limits, Ala. Code, §2950-52 (1896), except for the "city courts." While §2951 provided that the "intendant [mayor] has the powers and jurisdiction of a justice of the peace in all matters, civil and criminal, arising within the corporate limits,"

1. Although a city must now have definite boundaries, this was apparently not the case in England before the Municipal Corporations Act of 1835:

> A municipal corporation, like the manor and unlike the parish and the county, was, in fact, not primarily a territorial expression. It was a bundle of jurisdictions relating to persons, and only incidentally to the place in which those persons happened to be.

S. and B. Webb, English Local Government; The Manor and the Borough, Part One, 289 (1908). See also, F. Sengstock, Extraterritorial Powers in the Metropolitan Area, 1-2 (1962).

§944 (1896) provided that "the city courts and the judges thereof have and exercise all the jurisdiction and powers of the circuit court and the judges thereof." Since there is no other reference in that code to city courts, this section must be applicable to city courts created in specific charters of large cities. See, e.g., Act 78, 1871 Regular Session (Mobile city court); Act 301, 1900 Regular Session (Montgomery city court); Act 558, 1888 Regular Session (Birmingham city court). These city courts thus had the power to enforce state laws against non-residents of the city, but the city did not have the right to impose its ordinances outside its own jurisdiction.

The "police jurisdiction" of Alabama cities was created by Act 797, 1907 Regular Session, which was a comprehensive act "provid[ing] for the organization, incorporation, government and regulation of cities and towns" passed pursuant to the newly-added requirement of the 1901 Constitution that the legislature "shall not pass a special, private, or local law ... incorporating a city, town, or village, ... amending, confirming, or extending the charter of any private or municipal corporation ...." Ala. Const., Art IV, §104 (1901). Sections 57 and 58 of Act 797 have now been

recodified as Ala. Code, §11-40-10 (1975) -- the primary police jurisdiction statute. Section 60 of the Act allowed the recorder's court in each municipality to enforce city ordinances within the city and the police jurisdiction. This section was last codified as Ala. Code, Tit. 37, §585 (1958 Recomp.), and has now been replaced by Ala. Code, §12-14-1 (1975)(creating a municipal court with the same extra-territorial authority).

In 1927, the legislature first allowed cities to collect license fees (up to one-half the in-city fee) in the police jurisdiction. Act 580, 1927 Regular Session. This Act, with some modifications, is now found codified in Ala. Code, §11-51-91 (1975).

These acts can be classified according to the four types of extraterritorial powers indentified by one commentator:

> (1) the police power, (2) the power of taxation, (3) the power of eminent domain, and (4) the power to do business as a corporation and to acquire and use property for municipal purposes by methods other than direct taxation or eminent domain.

Anderson, "The Extraterritorial Powers of Cities," 10 Minn.L.Rev. 475, 482 (1926). It is only the first of these -- the police power -- that is being attacked in this action. If the police power falls, so too will the second

(the power of taxation), under the Alabama decisions (see, note at 22, supra).

The third and fourth types of extra-territorial powers -- the power of eminent domain and the power to do business -- are really corporate rather than governmental powers[1] and thus need not be limited by the city boundaries. All domestic corporations have the power to do business anywhere in the State and there is no reason to limit municipal corporations. Similarly, the right of eminent domain has been granted to electric, gas, railroad, telephone, and telegraph companies, Ala. Code, §§10-5-1 et seq (1975), as well as private landowners needing a right of way to a public road, Ala. Code, §18-3-1 (1975).

As pointed out earlier, Alabama cities do not enjoy the right of extramural zoning as part of their "police power," but they do have the right to control the subdivision of land within five miles of their respective

1. This dichotomy of governmental and corporate powers is defined in Maddox, Extraterritorial Powers of Municipalities in the United States 1-2 (1955):

> [The] ability or capacity for exercising control or authority over an area and persons therein... might be termed the "governmental power". ... [T]he ability of the municipality to do business or provide services in its capacity as a corporation [is its "corporate" power].

borders, Ala. Code, §11-52-30 and §11-52-31 (1975), and to adopt a master plan for the municipality and adjacent areas, Ala. Code, §11-52-8 (1975).[1] Although these statutes were not challenged, a voiding of the extra-territorial police power would also call into question the validity of subdivision controls, but not the planning function of city government.

Finally, there is the type of municipal power over non-residents that Sengstock refers to as "incidental exercise of police power" over businesses located outside the municipality but which sell their products within the city. Sengstock, op. cit. 45-47. For instance, in Dean Milk Co. v. City of Aurora, 404 Ill. 331, 88 NE2d 827 (1949), Aurora was allowed to inspect and license extramural milk processors as a condition to their right to sell within the city. Cf. Dean Milk Co. v. City of Madison, 340 U.S. 349, 354-5 (1951). Such actions by a city are not attacked in this case.

Other States

Three states grant cities the same extensive police powers that Alabama's cities enjoy: Idaho, one mile zone around certain

1. The power to plan is not the power to zone, Roberson v. City of Montgomery, 285 Ala. 421, 233 So.2d 69 (1970).

cities, Idaho Code, §50-606 (1967); North Dakota, one-half mile around all cities, N.D. Cent. Code, §40-06-01(2)(1968); South Dakota, one mile around all cities, S.D. Compiled Laws Ann. §9-29-1 (1967). Other states allow their cities to regulate certain types of activities that could be offensive, dangerous or objectionable, or to regulate health and sanitary conditions, or to zone, or to regulate subdivision platting. In all, 34 states have some type grant of extraterritorial power to cities. See, Comment, "The Constitutionality of the Exercise of Extraterritorial Powers by Municipalities," 45 Chicago L.Rev., 151, 152-57 and ns. 7-39 (1977). Most of the 16 states which do not grant extraterritorial powers to cities are located in the Northeast where there is a tradition of townships (or similar entities) as sub-county governments.

CONCLUSION

The dismissal of the complaint should be reversed and the power to govern without the franchise should be declared a denial of due process and equal protection of the laws.

The case should be remanded to the district court of three judges for consideration and issuance of appropriate relief.

Respectfully submitted,

Edward Still
Birmingham, Alabama

Neil Bradley
Laughlin McDonald
Christopher Coates
Atlanta, Georgia

Bruce Ennis
New York, NY

ATTORNEYS FOR APPELLANTS

American Civil Liberties
Union Foundation, Inc.

ADDENDUM A

Tuscaloosa ordinances having effect, by their terms, in the police jurisdiction as well as the city. All citations unless otherwise noted are to sections of Code of Tuscaloosa (1962, Supplemented 1975).

Licenses

4-1 ambulance
9-4, 9-18, 9-33 bottle dealers
19-1 junk dealers
20-5 general business license ordinance
20-67 florists
20-102 hotels, motels, etc.
20-163 industry

Buildings

10-1 inspection service enforces codes
10-10 regulation of dams
10-21 Southern Standard Building Code adopted
10-25 building permits
13-3 National Electrical Code adopted
14-23 Fire Prevention Code adopted
14-65 regulation of incinerators
14-81 discharge of cinders
Chapter 21A mobile home parks
25-1 Southern Standard Plumbing Code adopted
33-79 disposal of human wastes
33-114, 118 regulation of wells

Public Health

5-4 certain birds protected
5-40, 42, 55 dogs running at large and bitches in heat prohibited
14-4 no smoking on buses
14-15 no self-service gas stations
15-2 regulate sale of produce from trucks
15-4 food establishments to use public water supply
15-16 food, meat, milk inspectors
15-37 thru 40 regulates boardinghouses
15-52 milk code adopted
17-5 mosquito control

Traffic Regulations

22-2 stop & yield signs may be erected by chief of police
22-3 mufflers required
22-4 brakes required
22-5 inspection of vehicle by police
22-6 operation of vehicle
22-9 hitchhiking in roadway prohibited
22-9.1 permit to solicit funds on roadway
22-11 impounding cars
22-14 load limit on bridges
22-15 police damage stickers required after accident
22-25 driving while intoxicated
22-26 reckless driving
22-27 driving without consent of owner
22-33 stop sign
22-34 yield sign
22-38 driving across median
22-40 yield to emergency vehicle
22-42 cutting across private property
22-54 general speed limit
22-72 thru 78 truck routes

Criminal Ordinances

23-1 adopts all state misdemeanors
23-7.1 no wrecked cars on premises
23-15 nuisances
23-17 obscene literature
23-20 destruction of plants
23-37 swimming in nude
23-38 trespass to boats
26-51 no shooting galleries in the police jurisdiction or outside fire limits (downtown area)
28-31 thru 39 obscene films

Miscellaneous

20-120 thru 122 cigarette tax
24-31 public parks and recreation
26-18 admission tax
Chapter 29 regulates public streets
30-23 taxis must have meters

ADDENDUM B

STATUTES

§11-40-10. Police jurisdiction; territorial operation of ordinances for enforcement of police or sanitary regulations.

The police jurisdiction in cities having 6,000 or more inhabitants shall cover all adjoining territory within three miles of the corporate limits, and in cities having less than 6,000 inhabitants, and in towns, such police jurisdiction shall extend also to the adjoining territory within a mile and a half of the corporate limits of such city or town.

Ordinances of a city or town enforcing police or sanitary regulations and prescribing fines and penalties for violations thereof, shall have force and effect in the limits of the city or town and in the police jurisdiction thereof, and on any property or rights-of-way belonging to the city or town. (Code 1907, §1230; Code 1923, §1954; Code 1940, Tit. 37, §9).

§11-51-91. Establishment and collection of license for conduct of business, trade or profession outside corporate limits of municipality.

Any city or town within the state of Alabama may fix and collect licenses for any business, trade or profession done within the police jurisdiction of such city or town but outside the corporate limits thereof; provided,

that the amount of such licenses shall not be more than one half the amount charged and collected as a license for like business, trade or profession done within the corporate limits of such city or town, fees and penalties excluded; provided further, that when the place at which any such business, trade or profession is done or carried on is within the police jurisdiction of two or more municipalities which levy the licenses thereon authorized by this section, such licenses shall be paid to and collected by that municipality only whose boundary measured to the nearest point thereof is closest to such business, trade or profession; and provided further, that this section shall not have the effect of repealing or modifying the limitations in this division relating to railroad, express companies, sleeping car companies, telegraph companies, telephone companies and public utilities and insurance companies and their agents. (Acts 1927, No. 580, p. 674; Acts 1932, Ex. Sess., No. 235, p. 240; Code 1940, Tit. 37, §733; Acts 1943, No. 502, p. 477.)

§12-14-1. Establishment; jurisdiction.

(a) There is hereby established, effective December 27, 1977, for each municipal corporation, hereinafter referred to in this article as "municipality," within the state,

except those which elect not to have such courts by ordinance adopted before December 27, 1977, a municipal court subject to the authority, conditions and limitations provided by law.

(b) The municipal court shall have jurisdiction of all prosecutions for the breach of the ordinances of the municipality within its police jurisdiction.

(c) The municipal court shall have concurrent jurisdiction with the district court of all acts constituting violations of state law committed within the police jurisdiction of the municipality which may be prosecuted as breaches of municipal ordinances. (Acts 1975, No. 1205, §8-101.)